No. 82-1346

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

MOTION OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA FOR LEAVE TO FILE AS AMICUS CURIAE A BRIEF IN SUPPORT OF PETITIONERS

and

BRIEF OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
Motion of the Public Utilities Commission of the State of California for leave to file as amicus curiae a brief in support of petitioners	1
Brief of the Public Utilities Commission of the State of California as amicus curiae in support of petitioners	5
Statement of the case	5
Interest of the CPUC	9
Argument	9
Conclusion	14

TABLE OF AUTHORITIES CITED

Cases

Alabama Power Company v. FERC, 685 F.2d 1311 .... 8, 9

Statutes and Rules

Rules of Supreme Court, Rule 36.2 1

16 U.S.C.:

§ 791(a) et seq. 5

§ 797(e) 6

§ 800(a) 6

§ 803(a) 6, 13

§ 807(a) 6, 7, 9, 10, 13

§ 808(a) 6, 7, 8, 9, 10

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MOTION OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA FOR LEAVE TO FILE AS AMICUS CURIAE A BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the Public Utilities Commission of the State of California ("CPUC") moves this Court for leave to file as amicus curiae the accompanying brief. This motion is made necessary because all parties to the proceedings below did not consent to the filing of this brief.

The CPUC is an administrative agency established under the Constitution and laws of the State of California. Among its duties, the CPUC exercises regulatory jurisdiction over privately-owned electrical utilities providing retail service within California. By law, the CPUC is authorized to represent the customers of these electrical utilities in proceedings such as those presently before this Court for review.

Pacific Gas and Electric Company ("PG&E"), petitioner to this Court, is a privately-owned electrical utility subject to the jurisdiction of the CPUC. It serves some 3.5 million customers in California. Twenty percent of its total generating capacity is provided by hydroelectric projects licensed by the Federal Energy Regulatory Commission ("FERC"). The annual value of the power generated by these projects is approximately $800 million.

In the judgment before this Court for review, the United States Court of Appeals for the Eleventh Circuit affirmed an order of the FERC which would make possible the forced transfer of those projects and hundreds of others throughout the nation without payment of their cost of replacement and without any showing that the public interest would be better served thereby. Despite the highly serious ramifications of that order on the service provided to and the rates paid by retail electrical customers, however, the court of appeals did not undertake on its own 'o interpret the pertinent statutory provisions. Rather, it simply deferred to the FERC's interpretation.

WHEREFORE, given the vital importance of the FERC's order, and the lack of meaningful review accorded

it by the court of appeals, the CPUC moves this Court for leave to file as amicus curiae the accompanying brief.

Respectfully submitted,

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BRIEF OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Public Utilities Commission of the State of California ("CPUC") submits as amicus curiae this brief in support of petitioners, Pacific Gas and Electric Company ("PG&E"), *et al.*, who seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit issued in this case on September 17, 1982.

STATEMENT OF THE CASE

Part I of the Federal Power Act ("FPA"), known as the Federal Water Power Act of 1920 ("FWPA") until recodified by the Public Utilities Act of 1935, establishes a comprehensive scheme for the development of the nation's hydroelectric resources. 16 U.S.C. § 791a *et seq.* Section 4(a) authorizes the Federal Energy Regulatory Commission ("Commission" or "FERC") to issue licenses for the pur-

pose of such development. 16 U.S.C. § 797(e). 16 U.S.C. § 803(a). Section 14(a) grants to the United States on expiration of any license the right to take over the project on condition that it pay to the licensee net investment in the project plus reasonable severance damages and reserves to the United States, the individual States, and all municipalities the right to take over any project at any time by condemnation on payment of just compensation. 16 U.S.C. § 807(a). Section 15(a) authorizes the FERC on expiration of an original license, if the United States does not exercise its right of take-over, to issue a new license to either the original licensee or a new licensee—on condition that the new licensee pay to the original licensee net investment in the project plus reasonable severance damages. 16 U.S.C. § 808(a). Section 7(a) directs the FERC "in issuing licenses to new licensees under section 15" to give preference to applications by States and municipalities,

> provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . .

16 U.S.C. § 800(a).

On July 21, 1978, the City of Bountiful, Utah, petitioned the FERC for a declaratory order that this preference for public agencies applies not only when an original license is issued, but also on expiration of that license whenever a new license is issued. On August 15, 1978, a similar petition was filed by the City of Santa Clara, California. By notice issued on September 27, 1978, the FERC consolidated those petitions in Docket No. EL78-43.

On June 27, 1980, in that consolidated proceeding, the FERC issued Opinion No. 88 in which it declared that the

preference provided public agencies under Section 7(a) applies whenever a new license is issued. "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings," slip op. at 10. In reaching that conclusion, the FERC first rejected arguments by PG&E and other privately-owned utilities that, since Section 15(a) distinguishes between the terms, this preference cannot logically apply against "original licensees," but only against "new licensees." Such arguments fail, in the view expressed by the FERC, because the term "new licensee" is used in a different context in Section 7(a) than in Section 15(a). *Id.* at 42. That is, Section 15(a) concerns "predecessor/successor relationships in a context of successive license terms" and Section 7(a) "the single license term under consideration." *Id.* at 46-47. Moreover, according to the FERC, no reason exists why the term "new licensee" should be given the same meaning when used alone in Section 7(a) as when used in correlation with the term "original licensee" in Section 15(a). *Id.* at 46. Nonetheless, so the FERC believed, sufficient ambiguity exists regarding the term "new licensee" so as to compel resort to the legislative history of the FWPA. *Id.* at 47. Taking that resort, the FERC interpreted the absence of an express inclusion or exclusion in Section 7(a) of "successor licenses" as indication that Congress intended that the preference for public agencies apply whenever a new license is issued. *Id.* at 48.

In determining which among competing applications for a new license would thus best serve the public interest, the FERC will, it went on to explain, consider a variety of factors. *Id.* First, since the FPA does not limit the FERC's focus merely to physical and technical factors, the public interest should be viewed in its broadest sense, including

social impacts such as economic costs and benefits. *Id.* at 59-60. Second, because it was not intended by Congress to be a static concept, the public interest will vary with time and circumstances. *Id.* at 60. Third, to the extent that transfer would cause effects not present on initial licensing, the public interest will be more complex and complicated to evaluate when a successor license is issued. *Id.* Fourth, in light of the congressional purpose that they be enjoyed by as much of the public as possible, the public interest is affected by how widely a successor license would distribute the benefits of hydroelectricity. *Id.*

Petitions for judicial review of Opinion No. 88 were filed by PG&E and numerous other privately-owned utilities. These petitions were eventually consolidated in the U.S. Court of Appeals for the Eleventh Circuit. The Cities of Bountiful and Santa Clara, among others, intervened in support of the FERC.

On September 17, 1982, the court of appeals affirmed the FERC's decision that the preference for public agencies applies whenever a new license is issued. *Alabama Power Company v. FERC*, 685 F.2d 1311. In affirming that decision the court rejected, as had the FERC, the argument that since Congress could not have intended that the term "new licensee" include the term "original licensee," the preference provided in Section 7(a) is inapplicable to original licensees. 685 F.2d at 1316. Under this argument, according to the court, the FERC's administration of the FPA would prove "confusing and sporadic" since the preference would only operate in some cases. *Id.* Moreover, since the only time the original licensee would not be issued a new license would be when the project was unprofitable,

this argument leads to an "absurd result." *Id.* Even more absurd in the court's estimation is the result when a State or municipality is the original licensee. In that case, the State or municipality would lose its preference if it sought a new license. *Id.* Finally, rather than undertake its own interpretation of the statutory language at issue, the court concluded that it should give "great deference" to the decision of the FERC. 685 F.2d at 1318.

INTEREST OF THE CPUC

For the reasons set forth in the accompanying motion for leave to file a brief as amicus curiae which is incorporated herein by reference, the CPUC has a vital interest in the outcome of the proceedings before this Court for review. If allowed to stand, the decisions issued in those proceedings by the FERC and the Eleventh Circuit may well result in an annual increase of many hundreds of millions of dollars in the rates charged the customers of privately-owned utilities providing service within California. As the duly authorized representative of those customers, the CPUC is legally and morally bound to speak out and support petitioners in their attempt to have those decisions reversed.

ARGUMENT

As all parties would agree, the nature of the preference to be provided public agencies depends on the meaning of the words of Section 7(a) "in issuing licenses to new licensees under section 15." To understand those words, one must, as directed by Section 7(a), refer to the use of the term "new licensee" in Section 15. As used in Section 15(a), that term is given a specific, unambiguous meaning by the

distinction drawn with the term "original licensee": the original licensee is the holder of the original, expiring license and the new licensee is anyone other than the original licensee. In the language of Section 15(a):

> [T]he commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee. . . .

16 U.S.C. § 808(a).

Accordingly, when Sections 7(a) and 15(a) are read together, the phrase "in issuing licenses to new licensees under section 15" is made clear. Since a new licensee is anyone other that the original licensee, the preference provided public agencies under Section 7(a) applies only against applicants other than the original licensee—that is, it applies when only new licensees are in competition for a new license to be issued under Section 15. To read the phrase instead as including original licensees is to ignore the distinction drawn by Section 15(a).

By rejecting that distinction, the FERC was able to conclude that the preference for public agencies applies whenever a new license is issued. The contextual difference it suggested between "successive license terms" and "the single license term under consideration", however, simply makes no sense. Sections 15(a) and 7(a) both concern new licenses: Section 15(a) authorizes the FERC to issue new licenses and Section 7(a) prescribes in turn the preference to be given in issuing new licenses to new licensees. The context in each section is exactly the same. Nor is the absence in Section 7(a) of reference to original licensees per-

suasive evidence that Congress intended the term "new licensee" to have a different meaning than in Section 15(a). To the contrary, absence of such reference provides positive proof that Congress intended that preference not apply against original licensees. To reach the FERC's conclusion, one has to either ignore the phrase "to new licensees" or to read the word "new" as "any." In either case, the distinction provided in Section 15(a) would be given no effect.

As a consequence of the FERC's misinterpretation of the nature of preference, the review required to be performed of competing applications for a new license would be rendered meaningless. In Opinion No. 88, the FERC correctly identified the public interest as a complex and complicated subject, broad in its scope, varying with time and circumstance. The number of customers served by an applicant, the size of its electrical system, the economic costs and benefits of a particular project—all are factors which the FERC indicated should be considered in the determination of the public interest. To prove meaningful, therefore, review of competing applications should include a full evaluation of how their plans would "conserve and utilize in the public interest the water resources of the region."

By concluding that Congress intended that the preference for public agencies should apply whenever a new license is issued, however, the FERC transformed the limited remedy of preference into a facile means by which to decide tough cases. Thus, rather than determine which among competing plans would best serve the public interest, the opportunity is created to simply inquire whether the various plans are reasonably similar. Possibly, in the

rare case, competing plans may be fairly said to serve the public interest equally well; but in all cases, review should be full and complete.

Similarly, in its affirmation of Opinion No. 88, the court of appeals failed to come to grips with the nature of preference. In the first place, if preference is held to be inapplicable against original licensees, the FERC's review would prove neither confusing nor sporadic. Rather, in each case, the FERC would be required to conduct a comprehensive review of competing applications. Second, a fair chance for original licensees to receive a new license can hardly be considered an absurd result. Moreover, profitable projects can be taken away—for instance, if they were not well operated, if improvements are required, or if a competing applicant presents better plans. Most importantly, however, the court's error lies in its acceptance, without apparent resort to research and analysis, of the notion that preference is a ready substitute for meaningful review. Acceptance of that notion simply legitimates too much.

If allowed to stand, therefore, these decisions would cause retail customers of privately-owned electrical utilities to suffer a great and lasting injustice. By way of example, PG&E serves some 3.5 million customers. Twenty percent of its generating capacity is provided by hydroelectric projects licensed by the FERC. The annual value of the power generated by these projects is approximately $800 million. In contrast, the City of Santa Clara, which has pending before the FERC an application for a new license to operate the Mokelumne River Project presently under license to PG&E, provides service to about 40

thousand customers. The rates it charges for such service are almost 50 percent lower than those PG&E charges its customers. Opinion No. 88, as affirmed by the court of appeals, would make possible the forced transfer of the Mokelumne River Project to Santa Clara without payment of its cost of replacement and without any showing that the public interest would be better served thereby. It would serve to increase rates for PG&E's customers and decrease them for Santa Clara's. Where would be the justice in that result?

On the other hand, if these decisions are set aside, States and municipalities will retain a fair opportunity to obtain hydroelectric power. In the first place, as preference customers of federal agencies and wholesale customers of privately-owned utilities, they already enjoy access to more than their proportionate share of such power. Moreover, either by exercising their powers of eminent domain under Section 14(a) of the FPA or by applying for new licenses under Section 15(a), public agencies can still seek to acquire hydroelectric projects. In the former case, they need only pay just compensation; and, in the latter, only demonstrate, as must competing original licensees, that their plans would better serve the public interest. The fairness of this scheme cannot be honestly denied.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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